

FENNEMORE CRAIG, P.C.  
David W. Dachelet (No. 6615)  
300 South Fourth Street, Suite 1400  
Las Vegas, Nevada 89101  
Telephone: 702.692.8000  
Facsimile: 702.692.8099  
Email: [ddachelet@fclaw.com](mailto:ddachelet@fclaw.com)

Attorneys for Plaintiff/Counterdefendant  
KEYBANK NATIONAL ASSOCIATION

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

KEYBANK NATIONAL ASSOCIATION,  
  
Plaintiff,

vs.

FRANK NIELSEN, an individual; ROBERT H.  
SCHULMAN, an individual; LAWRENCE J.  
WINNERMAN, an individual; SANFORD B.  
WINNERMAN, an individual; and WW  
CENTENNIAL HILLS, LLC, a Delaware  
limited liability company,

Defendant.

Case No.: 2:10-cv-00352-PMP-LRL

**MOTION TO  
SUBSTITUTE PARTY**

AND ALL RELATED CLAIMS.

Plaintiff/Counterdefendant KEYBANK NATIONAL ASSOCIATION (hereinafter the  
"Plaintiff" or "KeyBank") by and through its undersigned counsel of record, David W. Dachelet,  
Esq. of the law office of Fennemore Craig, P.C., hereby files its Motion for Substitution of Party.

This Motion is made and based upon Fed. R. Civ. P. 25(a), the Memorandum of Points  
and Authorities which follows, the papers and pleadings on file herein, and any oral argument this  
Court should choose to entertain.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**STATEMENT OF FACTS**

On or about March 15, 2010, KeyBank commenced the instant action alleging its claims

for the individual defendants<sup>1</sup> for breach of guaranty or, in the alternative, unjust enrichment. *See* Complaint (#1). Shortly thereafter, the real property securing the loan the individual defendants guaranteed was sold and, therefore, KeyBank amended its complaint to add the borrower, WW Centennial Hills, LLC,<sup>2</sup> as a defendant and reformulate this case to one seeking a deficiency. *See* Amended Complaint (#6). The Defendants filed their own Counterclaim against KeyBank. *See* Answer to Complaint and Counterclaim (#10).

Upon information and belief, Defendant Frank Nielsen ("Nielsen") passed away on November 22, 2010 in Clark County, Nevada. On February 9, 2011, Nielsen's counsel filed a Suggestion of Death Upon the Record pursuant to Fed. R. Civ. P. 25(a)(2) (the "Suggestion of Death"). *See* Suggestion of Death Upon the record (#20), a copy of which is attached hereto as **Exhibit 1**. The Suggestion of death does not identify Nielsen's legal representative but does state that the parties suggesting his death were Lawrence J. Winnerman, Sanford B. Winnerman, and WW Centennial Hills, LLC. *Id.* No other information is contained in the Suggestion of Death.

Accordingly, on March 15, 2011, the undersigned sent counsel for the Winnermans and WW Centennial Hills, LLC correspondence requesting that Nielsen's legal representative be identified. A copy of the March 15, 2011 letter is attached hereto as **Exhibit 2**. Despite the undersigned's request, no additional information has been provided regarding who Nielsen's successor or legal representative is. Nevertheless, after a review of available court records, it appears that a Petition to appoint an executrix for Nielsen's estate and for general administration of Nielsen's will has been filed in the Clark County Probate Court. *See* Register of Actions attached hereto as **Exhibit 3**. As of this writing, it appears that no estate representative has been appointed. *Id.* In order to facilitate the administration of the instant action, KeyBank requests that this Court substitute the Executrix of Nielsen's estate in place of the decedent Nielsen.

## II.

### LEGAL ARGUMENT

Where the death of a party has occurred, the substitution of parties is governed by the

<sup>1</sup> That is, Frank Nielsen, Robert H. Schulman, Lawrence J. Winnerman, and Sanford B. Winnerman.

<sup>2</sup> Collectively with the individual defendants referred to as the "Defendants."

provisions of Fed. R. Civ. P. 25. That rule states, in relevant parts, as follows:

If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

Fed. R. Civ. P. 25(a)(1). To restate, Fed. R. Civ. P. 25(a) itself provides for the substitution of Mr. Nielsen's legal representative in his place. The 90-day time period for filing a motion to substitute a decedent's successor or representative does not begin until a formal suggestion of death is served. *Id.*; see also *Anderson v. Auroteck*, 774 F.2d 927, 931 (9th Cir. 1985); *Acri v. Int'l Ass'n of Mach. & Aerospace Workers*, 595 F. Supp. 326, 330 (N.D. Cal. 1983).

The Suggestion of Death was filed and served on February 9, 2011. Exhibit 1. Nielsen's estate was not opened for probate until very recently on March 23, 2011. Exhibit 3. Although Nielsen's representative has not yet been appointed, it appears that one will be appointed shortly. *Id.* Accordingly, in order to comply with Fed. R. Civ. P. 25(a)'s requirements, KeyBank has filed the instant motion and requests that the executrix of Nielsen's estate be appointed in place of Nielsen in this matter pursuant to Fed. R. Civ. P. 25(a).

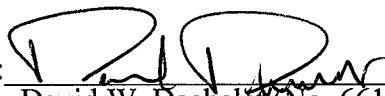
### III.

### CONCLUSION

For the reasons set forth above, Plaintiff's Motion for Substitution of Party should be granted.

DATED this 25 day of April, 2011.

FENNEMORE CRAIG, P.C.

By:   
David W. Dachelet (No. 6615)  
300 South Fourth Street, Suite 1400  
Las Vegas, Nevada 89101

Attorneys for Plaintiff/Counterdefendant  
KEYBANK NATIONAL ASSOCIATION

**CERTIFICATE OF SERVICE**

On April 25, 2011, I served the following document(s):

**MOTION TO SUBSTITUTE PARTY**

I served the above-named document(s) by the following means to the persons as listed below:

☒ **By ECF System** (or the "Notice of Electronic Filing" to all addressees):

☐ **By U.S. Mail**, postage fully prepared to persons and addresses as follows:

William R. Urga, Esq.  
Mindy C. Fisher, Esq.  
Jolley Urga Wirth Woodbury & Standish  
3800 Howard Hughes Pkwy., 16th Fl.  
Las Vegas, NV 89169-0925  
*Attorneys for Defendants/Counterclaimants*  
*Lawrence J. Winnerman, Sanford B.*  
*Winnerman, and WW Centennial Hills, LLC*

Michael J. Oakes, Esq.  
Foley & Oakes, P.C.  
850 E. Bonneville Ave.  
Las Vegas, NV 89101-7031  
*Attorneys for Defendant/Counterclaimant*  
*Robert H. Schulman*

☐ **By Personal Service** (to persons and addresses):

☐ For a party represented by an attorney, delivery was made by handing the document(s) to the attorney or by leaving the document(s) at the attorney's office with a clerk or other person in charge, or if no one is in charge by leaving the document(s) in a conspicuous place in the office.

☐ For a party, deliver was made by handing the document(s) to the party or by leaving the document(s) at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

☐ **By Direct Email** (as opposed to through the ECF system (list persons and email addresses). Based upon the written agreement of the parties to accept service by email or a court order, I caused the document(s) to be sent to the persons at the email addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☐ **By Facsimile Transmission:** (list persons and fax numbers): Based upon the written agreement of the parties to accept service by fax transmission or a court order, I faxed the document(s) to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission is attached.

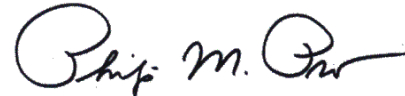
1       [ ]   **By Messenger:** I served the document(s) by placing them in an envelope or  
2 package addressed to the persons at the addresses listed below and providing them to a messenger  
service. (A declaration by the messenger must be attached to this Certificate of Service).

3 I declare under penalty of perjury that the foregoing is true and correct.

4       DATED this 25th day of April, 2011.

5  
6       /s/ Shirley May Martir-Ligot  
An Employee of Fennemore Craig, P.C.

7  
8  
9       IT IS SO ORDERED.

10         
11

12       PHILIP M. PRO  
13       UNITED STATES DISTRICT JUDGE

14       Dated: May 13, 2011.

Exhibit “1”

Exhibit “1”

WILLIAM R. URG, ESQ.  
Nevada Bar No. 1195  
MINDY C. FISHER, ESQ.  
Nevada Bar No. 11121  
JOLLEY URG, WIRTH WOODBURY & STANDISH  
3800 Howard Hughes Parkway  
Wells Fargo Tower, Sixteenth Floor  
Las Vegas, Nevada 89169  
Telephone: (702) 699-7500  
Facsimile: (702) 699-7500  
Email: [FedCt@juww.com](mailto:FedCt@juww.com)  
Email: [mcf@juww.com](mailto:mcf@juww.com)

Attorneys for Defendants

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

KEYBANK NATIONAL ASSOCIATION,

CASE NO.: 2:10-cv-00352-PMP-LRL

Plaintiff,

vs.

FRANK NIELSEN, an individual;  
ROBERT H. SCHULMAN, an individual;  
LAWRENCE J. WINNERMAN, an  
individual; SANFORD B. WINNERMAN,  
an individual; and WW CENTENNIAL  
HILLS, LLC, a Delaware limited liability  
company,

Defendants.

AND RELATED CLAIMS

**SUGGESTION OF DEATH UPON THE RECORD**

Defendants Lawrence J. Winnerman, Sanford B. Winnerman, and WW Centennial Hills,  
LLC, by and through their attorneys, Jolley, Urg, Wirth & Woodbury, suggests upon the record,

///

///

///

pursuant to FRCP 25(a)(1), the death of Defendant Frank Nielsen during the pendency of this action.

DATED this 9th day of February, 2011.

JOLLEY URG WIRTH WOODBURY &  
STANDISH

By: /s/ Mindy C. Fisher, Esq.  
WILLIAM R. URG, ESQ.  
Nevada Bar No. 1195  
MINDY C. FISHER, ESQ.  
Nevada Bar No. 11121  
3800 Howard Hughes Parkway, 16th Floor  
Las Vegas, Nevada 89169  
Telephone: (702) 699-7500  
Facsimile: (702) 699-7555  
Email: [FedCt@juww.com](mailto:FedCt@juww.com)  
Email: [mcf@juww.com](mailto:mcf@juww.com)

Attorneys for Defendants

**CERTIFICATE OF SERVICE**

This will hereby certify that I am employed in the County of Clark, State of Nevada, am over the age of 18 years and not a party to this action. My business address is that of Jolley Urg Wirth Woodbury & Standish, 3800 Howard Hughes Parkway, Suite 1600, Las Vegas, Nevada 89169.

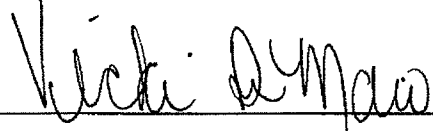
This is to certify that on February 9, 2011, I electronically filed **SUGGESTION OF DEATH UPON THE RECORD** with the Clerk of Court using the CM/ECF system, which will cause the document to be served upon the following counsel of record:

David W. Dachelet, Esq.  
Fennemore Craig, P.C.  
300 S. 4th Street, 14th Floor  
Las Vegas, Nevada 89101  
E-mail: [ddachelet@fclaw.com](mailto:ddachelet@fclaw.com)

Attorneys for Plaintiff



1 I certify under penalty of perjury that the foregoing is true and correct, and that this  
2 Certificate of Service was executed by me on February 9, 2011 at Las Vegas, Nevada.

3  
4 

5 An Employee of JOLLEY URGAL WIRTH  
6 WOODBURY & STANDISH  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

JOLLEY URGAL WIRTH WOODBURY & STANDISH  
3800 Howard Hughes Parkway, Suite 1600, Las Vegas, NV 89169  
Telephone: (702) 699-7500 Fax: (702) 699-7555

Exhibit “2”

Exhibit “2”

## FENNEMORE CRAIG, P.C.

Suite 1400 Bank of America Plaza  
300 South Fourth Street  
Las Vegas, Nevada 89101  
(702) 692-8000

David W. Dachelet  
Direct Phone: (702) 692-8033  
Direct Fax: (702) 692-8099  
ddachelet@fclaw.com

**Law Offices**  
Phoenix (602) 916-5000  
Tucson (520) 879-6800  
Nogales (520) 281-3480  
Las Vegas (702) 692-8000  
Denver (303) 291-3200

March 15, 2011

### **VIA FACSIMILE AND U.S. MAIL**

William R. Urga, Esq.  
Mindy C. Fisher, Esq.  
**Jolley Urga Wirth Woodbury & Standish**  
3800 Howard Hughes Parkway  
Wells Fargo Tower, Sixteenth Floor  
Las Vegas, Nevada 89169

**Re: KeyBank National Association v. Frank Nielsen, et al.**  
**Case No. 2:01-cv-00352-PMP-LRL**  
**File No.: 15580.049**

Dear Mr. Urga and Ms. Fisher:

As you know, on February 9, 2011, your office filed a Suggestion of Death Upon the Record noting Frank Nielsen's recent passing. Pursuant to Fed. R. Civ. P. 25(a)(1), a motion to substitute the proper party must be made within ninety (90) days or by May 10, 2011. As of this letter, it does not appear that a probate estate has been opened and the Suggestion of Death does not indicate the party to substitute in for Mr. Nielsen. Accordingly, please advise me of the party to be substituted in place of Mr. Nielsen in this case so that I may prepare the appropriate motion.

Given that some time has already passed since the filing of the Suggestion of Death, I would appreciate a response by March 18, 2011. I appreciate your prompt attention to this matter and look forward to hearing from you.

Sincerely,

FENNEMORE CRAIG, P.C.



David W. Dachelet

DDAC/alb

cc: J. Michael Oakes, Esq. (via facsimile and U.S. Mail)

TRANSMISSION VERIFICATION REPORT

TIME : 03/15/2011 13:37  
NAME : FENNEMORE CRAIG  
FAX : 7026928099  
TEL :  
SER.# : BROL7J730939

DATE, TIME  
FAX NO./NAME  
DURATION  
PAGE(S)  
RESULT  
MODE

03/15 13:36  
6997555  
00:00:36  
02  
OK  
STANDARD  
ECM

**FAX**

**FENNEMORE CRAIG, P.C.**

Suite 1400 Bank of America Plaza, 300 South Fourth Street  
Las Vegas, Nevada 89101

The pages that follow may contain sensitive, privileged or confidential information intended solely for the addressee named below. If you receive this message and are not the agent or employee of the addressee, this facsimile communication has been sent in error. Please do not disseminate or copy any of the attached and notify the sender immediately by telephone. Please also return the attached sheet(s) to the sender by mail.

<b>Date:</b>	March 15, 2011		
<b>To:</b>	William R. Urga, Esq. Mindy C. Fisher, Esq.	<b>From:</b>	David W. Dachelet, Esq.
<b>Firm:</b>	Jolley Urga Wirth Woodbury & Standish	<b>Fax No.:</b>	(702) 692-8099
<b>Fax No.:</b>	(702) 699-7555	<b>Bus. No.:</b>	(702) 692-8033
<b>Bus. No.:</b>	(702) 699-7500	<b>Pages (including cover):</b>	<u>2</u>

Please telephone (702) 692-8033 if all pages are not received.

**Re:** *KeyBank National Association vs. Frank Nielsen, et al.*  
*USDC, Case No. 2:09-cv-00352-PMP-LRL*  
*Our File No. 15580.049*

**Comments:**

Please see attached.

**FAX****FENNEMORE CRAIG, P.C.**

Suite 1400 Bank of America Plaza, 300 South Fourth Street  
Las Vegas, Nevada 89101

The pages that follow may contain sensitive, privileged or confidential information intended solely for the addressee named below. If you receive this message and are not the agent or employee of the addressee, this facsimile communication has been sent in error. Please do not disseminate or copy any of the attached and notify the sender immediately by telephone. Please also return the attached sheet(s) to the sender by mail.

<b>Date:</b>	March 15, 2011	<b>From:</b>	David W. Dachelet, Esq.
<b>To:</b>	William R. Urga, Esq. Mindy C. Fisher, Esq.	<b>Fax No.:</b>	(702) 692-8099
<b>Firm:</b>	Jolley Urga Wirth Woodbury & Standish	<b>Bus. No.:</b>	(702) 692-8033
<b>Fax No.:</b>	(702) 699-7555	<b>Pages (including cover):</b>	<u>2</u>
<b>Bus. No.:</b>	(702) 699-7500		

Please telephone (702) 692-8033 if all pages are not received.

**Re:** *KeyBank National Association vs. Frank Nielsen, et al.*  
*USDC, Case No. 2:09-cv-00352-PMP-LRL*  
*Our File No. 15580.049*

**Comments:**

Please see attached.

**Law Offices:**

**Phoenix**  
3003 North Central Avenue  
Suite 2600  
Phoenix, AZ 85012

**Tucson**  
One South Church Avenue  
Suite 1000  
Tucson, AZ 85701

**Nogales**  
420 West Mariposa Road  
Suite 200  
Nogales, AZ 85621

**Las Vegas**  
Suite 1400 Bank of America Plaza  
300 South Fourth Street  
Las Vegas, Nevada 89101

**Denver**  
1700 Lincoln Street  
Suite 2900  
Denver, Colorado 80203

LAS/111346.1/15580.049

TRANSMISSION VERIFICATION REPORT

TIME : 03/15/2011 13:38  
NAME : FENNEMORE CRAIG  
FAX : 7026928099  
TEL :  
SER. # : BROL7J730939

DATE, TIME 03/15 13:37  
FAX NO./NAME 3842128  
DURATION 00:00:20  
PAGE(S) 02  
RESULT OK  
MODE STANDARD  
ECM

**FAX**

**FENNEMORE CRAIG, P.C.**

Suite 1400 Bank of America Plaza, 300 South Fourth Street  
Las Vegas, Nevada 89101

The pages that follow may contain sensitive, privileged or confidential information intended solely for the addressee named below. If you receive this message and are not the agent or employee of the addressee, this facsimile communication has been sent in error. Please do not disseminate or copy any of the attached and notify the sender immediately by telephone. Please also return the attached sheet(s) to the sender by mail.

Date:	March 15, 2011	From:	David W. Dachelet, Esq.
To:	Michael J. Oakes, Esq.	Fax No.:	(702) 692-8099
Firm:	Foley & Oakes, P.C.	Bus. No.:	(702) 692-8033
Fax No.:	(702) 384-2128	Pages (including cover):	<u>2</u>
Bus. No.:	(702) 384-2070		

Please telephone (702) 692-8033 if all pages are not received.

**Re: KeyBank National Association vs. Frank Nielsen, et al.**  
**USDC, Case No. 2:09-cv-00352-PMP-LRL**  
**Our File No. 15580.049**

**Comments:**

Please see attached.

**FAX**

**FENNEMORE CRAIG, P.C.**

Suite 1400 Bank of America Plaza, 300 South Fourth Street  
Las Vegas, Nevada 89101

The pages that follow may contain sensitive, privileged or confidential information intended solely for the addressee named below. If you receive this message and are not the agent or employee of the addressee, this facsimile communication has been sent in error. Please do not disseminate or copy any of the attached and notify the sender immediately by telephone. Please also return the attached sheet(s) to the sender by mail.

<b>Date:</b>	March 15, 2011	<b>From:</b>	David W. Dachelet, Esq.
<b>To:</b>	Michael J. Oakes, Esq.	<b>Fax No.:</b>	(702) 692-8099
<b>Firm:</b>	Foley & Oakes, P.C.	<b>Bus. No.:</b>	(702) 692-8033
<b>Fax No.:</b>	(702) 384-2128	<b>Pages (including cover):</b>	<u>2</u>
<b>Bus. No.:</b>	(702) 384-2070		

*Please telephone (702) 692-8033 if all pages are not received.*

**Re:** *KeyBank National Association vs. Frank Nielsen, et al.*  
*USDC, Case No. 2:09-cv-00352-PMP-LRL*  
*Our File No. 15580.049*

**Comments:**

Please see attached.

**Law Offices:**

**Phoenix**  
3003 North Central Avenue  
Suite 2600  
Phoenix, AZ 85012

**Tucson**  
One South Church Avenue  
Suite 1000  
Tucson, AZ 85701

**Nogales**  
420 West Mariposa Road  
Suite 200  
Nogales, AZ 85621

**Las Vegas**  
Suite 1400 Bank of America Plaza  
300 South Fourth Street  
Las Vegas, Nevada 89101

**Denver**  
1700 Lincoln Street  
Suite 2900  
Denver, Colorado 80203

LAS/111347.1/15580.049

Exhibit “3”

Exhibit “3”



Logout My Account Search Menu New Family Record Search Refine Search Back

Location : Family Help

**REGISTER OF ACTIONS**

CASE NO. P-11-070921-E

In the Matter of Frank Nielsen, Deceased

§  
§  
§  
§  
§  
§Case Type: **Probate - General  
Administration**Date Filed: **03/23/2011**Location: **Department H**Conversion Case Number: **P070921****PARTY INFORMATION****Decedent Nielsen, Frank**

DOD: 11/22/2010

**Lead Attorneys****Alise S. Denton, ESQ***Retained*

7023841723(W)

**Petitioner Nielsen, Kamela****Alice A. Denton***Retained*

7024717432(W)

**EVENTS & ORDERS OF THE COURT****OTHER EVENTS AND HEARINGS**

03/23/2011 **Petition**  
for Admission of Will to Probate for Appointment of Executrix and for Issuance

03/28/2011 **Notice of Hearing**  
Notice of Hearing for Adminssion of Will to Probate, for Appointment of Executrix and For Letters Testamentary

03/30/2011 **Certificate of Mailing**  
Certificate of Mailing

04/06/2011 **Certificate of Mailing**  
Additional Certificate of Mailing

04/06/2011 **Amended Petition**  
Amendment to Petition for Admission of Will to Probate, for Appointment of Executrix and for Issuance of Letters Testamentary and for General Administration

04/06/2011 **Amended Petition**  
Amendment to Petition for Admission of Will to Probate, for Appointment of Executrix and for Issuance of Letters Testamentary and for General Administration

04/13/2011 **Affidavit of Publication**  
Affidavit of Publication

04/15/2011 **Hearing (9:30 AM) (Judicial Officer Yamashita, Wesley)**  
**04/15/2011, 04/22/2011**  
Petition for Admission of Will to Probate, for Appointment of Executrix and for Issuance of Letters Testamentary and for General Administration  
Result: Matter Continued

**FINANCIAL INFORMATION**

	<b>Petitioner Nielsen, Kamela</b>		
	Total Financial Assessment		539.00
	Total Payments and Credits		539.00
	<b>Balance Due as of 04/25/2011</b>		<b>0.00</b>
03/25/2011	Transaction Assessment		539.00
03/25/2011	Payment (Window) Receipt # 2011-12159-FAM	Denton, Alice A.	(539.00)